No. 98-266

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ANNE ARUNDEL COUNTY, MARYLAND
Petitioner,

v.

JOHN D. WEST, ET AL.,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act's § 7(k) overtime exemption for public safety employees covers local government firefighters who perform emergency medical services, where Congress intended to exempt them, and the plain statement rule dictates exemption if the law is ambiguous?

2. Whether the Fair Labor Standards Amendments of 1974 violate the Tenth Amendment?

LIST OF PARTIES

The Petitioner in this proceeding is Anne Arundel County, Maryland. Respondents are John D. West; Marianne C. Anderson; Michael C. Andresky; Susan L. Bailey; Brian L. Bond; Charles W. Boyer; Richard A. Brock; Daniel Brown; Anthony W. Burke, Sr.; Tracy L. Burke; Guy Steven Childers; Kim J. Cissna Ross; Riccardo Colella; Larry P. Collison; Michael Albert Connor; Michael E. Cox, Jr.; Timothy Crawford; Anita Y. Dunham; Michele Delalla; Grafton G. Dietz, Jr.; James H. Edwards, Jr.; Mara L. Eicens; Wayne Eisenhardt; Karen Estepp; Douglas G. Fishel, Jr; Terry A. Gero; James L. Glime; James E. Goetz; Jeffrey P. Gormley; John Greene; Kathleen D. Grote; Russell Lloyd Harris; Sharon M. Henry; Michael William Herz; Lisa Anne Housand; Joseph M. Huber; William W. Isennock; Daniel L. Jarzynski; C. Edward Jett; Robert Frederick Johnson; Stephen E. Jones; Richard Allen Joy; Clifford C. Kooser II; James David Kruger; Douglas P. Marshall; Michael J. Marsiglia; William L. Merson; Timothy L. Mikules; Michael Steven Moore, Jr.; Greg A. Novak; George L. Pfeffer, Jr.; Noldon Pope; Mark Steven Praschak; Patrick O. Prendergast; Carol Ann Rabinowitz; Cynthia Ray Ell; Hurshel W. Shank, Jr.; Cecilia W. Sledgeski Warren; Gregory Lee Smith III; Randolph S. Spies; Thomas Stag; Peter G. Staley; Logan Starr, Sr.; Frank R. Stamm; David Sterling; Michael Swain; Keith D. Swindle; John Steven Thompson; Timothy Aldyn Tucker; Robert T. Vaccaro, Jr.;

Robert Valderas; Marcus D. Wallace; William H. Ward; Khris Edwin Wildt; William Mark Wilhelm; David K. Williams; Raymond J. Schmidt; Kimberly S. Schneider; Michael Andrew Smith; John B. Wellman; Robert A. Harsh; Robert Anthony Mead; James Carroll Rostek, Sr.; Rand J. Lindgren; Raymond Gene Cullison, Jr.; Dawn Rodriguez; David R. Klinger; William H. Phillips; Bruce E. Fritz; Charles Edward Yetter; R. Thomas Crow II; Debbie Schueler; William A. Cooper, Jr.; Steven K. Frye; Michael C. Huffman; Joseph M. Jordan; David James Geslois; Russell E. Davies, Jr.; Erick A. Esker; Donald Weigel; Ralph David Ritchie; Kenneth S. Banke; Jeannie Squillaci; Harry Joseph Joyave; Michael B. Ladd; William L. Bethea III; John E. Lamb; Daniel T. Woolston; Patrick J. Carmody; Clarence Gerard Hayes; Brett J. Howe; D. Depriest; John G. Alexander; Steven P. Ambrozowicz; Daniel F. Bowen; Claudia L. Clark; Susan E. Egan; Stephen Scott Feilinger; James Edward Harsh; Sarah Lefler; John Duffy McAnallen; Robert O'Brien; Michael F.X. O'Connell, Jr.; Anthony J. Pugliese; Edward Joseph Ross III; Randall W. Corbel; Kenneth T. Claypool; John A. Covington; John N. Dennett; George F. Dickey; Stephanie Sheinbach Dietz; Roland Fink, Jr.; Walter A. Ford, Jr.; Jeffrey L. Orye; Kenneth L. Pardoe; Keith A. Lefler; James L. Kidwell; Thomas A. Pezza; David A. Badwak; Douglas Bosley; Thomas R. Butler, Jr.; and Michael P. Henry. The United States of America is an Intervenor. Baltimore County, Maryland, is an *amicus curiae*.

CORPORATE DISCLOSURE

Baltimore County, Maryland, is a body corporate and politic, organized under the laws of the State of Maryland and the Charter of Baltimore County, Maryland, and as such has no corporate parents or subsidiaries.

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Baltimore County, Maryland, respectfully supports the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *West v. Anne Arundel County, Md.*, 137 F.3d 752 (4th Cir. 1998), 135 Lab.Cas. P33, 647,4 Wage and Hour Cas.2d (BNA) 641 (Feb. 18, 1988) (No. 96-1280, 96-1251). The opinions of the district court are unreported. All of these opinions appear in the appendix to the petition filed by Anne Arundel County.

JURISDICTION

The court of appeals has entered its judgment, which this Court may review by issuing a writ of certiorari to exercise jurisdiction of this case under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *amici curiae* adopt the provisions set forth in the petition for writ of certiorari.

STATEMENT OF THE CASE

Baltimore County is a political subdivision of the State of Maryland and exercises the powers of local government and home rule provided by the Maryland Constitution. Md. Const. art. XI-A; Md. Ann. Code, Art. 25A (1998). The County provides fire and rescue services to its community.

Modern fire departments, such as the Baltimore County Fire Department, are required to respond to various types of emergencies. The responsibilities of the County Fire Department are not limited to mere fire suppression. Article III of the Baltimore County Fire Department's Rules and Regulations Handbook vests the general administration and control of the Fire Department in a Fire Chief. The Fire Chief is responsible not only for the general conduct of the Fire Department, but also for the protection of life and property, fire prevention, fire investigations, public education, fire prevention code enforcement, and the provision of emergency medical care to County residents. The wide scope of "fire protection services" provided by the County Fire Department evidences the County's response to expanding community needs. The above listed responsibilities of the Fire Department are integral aspects of local fire and rescue services. The plain meaning of the FLSA recognizes rescue services as an indispensable aspect of "fire protection services."

REASONS FOR GRANTING THE PETITION

This Court should hear this case to clarify the ability of a local government to incorporate emergency medical services into its fire protection services. The ambiguity of the term "fire protection services" must be deciphered. The Department of Labor Regulations and lower courts have been unable to elucidate the issue, which has resulted in a nationwide confusion. It is now time for this Court to interpret the phrase, and

reconsider the applicability of the FLSA to local governments.

I.

THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AND HEIGHTENS THE CONFUSION SURROUNDING THE § 7(k) EXEMPTION.

The lower court decisions addressing the applicability of the 29 U.S.C. § 207(k) exemption deviate in the rationale utilized to reach the end result. Hence, the decisions involving an identical issue, the applicability of 29 U.S.C. § 207(k) to emergency medical technicians[1], conflict throughout the country. The courts have attempted to interpret and clarify the Fair Labor Standards Act using both the Code of Federal Regulations ("C.F.R."), promulgated by the Department of Labor ("DOL"), and the Department of Labor letters in efforts to realize and properly apply Congressional intent. Yet a uniform, nationwide application has not been attained.

Several tests have been advanced in determining the §207(k) exemption requirements. Pursuant to 29 C.F.R. § 553.210(a)[2], the DOL offers a four part test to define the term

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[1]The term "emergency medical technicians" (EMT) also includes paramedics.

[2] 29 C.F.R § 553.210(a) establishes a four-part test defining "any employee...in fire protection activities" as follows: any employee (1)

"any employee in fire protection activities." Following the four part test, the section continues:

> the term would also include rescue and ambulance service personnel if such personnel form an *integral part* of the public agency's fire protection activities. See § 553.215.

(Emphasis added). The regulations specifically steer the reader to 29 C.F.R. § 553.215 for guidance. While the intent of Congress to include rescue and ambulance personnel within the exemption is clear, the "integral part" test is ambiguous.

Reference to 29 C.F.R. §553.215 is of little help. Section 553.215 further confuses the issue by its first sentence.

> Ambulance and rescue service employees of a public agency *other than* a fire protection or law enforcement agency may be treated as employees engaged in fire protection...[3]

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who is employed by an organized fire department or fire protection district;(2) who has been trained to the extent required by State statute or local ordinance;(3) who has the legal authority and responsibility to engage in the prevention, control, or extinguishment of a fire of any type; and (4) who performs activities which are required for, and directly concerned with, the prevention, control or extinguishment of fires, ...

[3] Ambulance and rescue service employees may be treated as employees engaged in fire protection if their services are substantially related to firefighting. The two-part "substantially related" test of 29 C.F.R. § 553.215 requires that (1) the ambulance and rescue service employees have received training in the rescue of fire, crime, and accident victims

(Emphasis added). Reading 29 C.F.R. § 553.210 together with 29 C.F.R. § 553.215, it appears that, by its terms, the "substantially related" test advanced in 29 C.F.R. § 553.215 does not apply to employees employed by an organized fire protection public agency, the first element of the 29 C.F.R. § 553.210 test. Therefore, a literal reading indicates that the substantially related test may not be used to determine if an employee satisfies the integral part requirement. The reference to § 553.215 in § 553.210 is inconsistent with the apparent coverage of 29 C.F.R. § 553.215.[4]

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or firefighters or law enforcement personnel injured in the performance of their respective duties, and (2) the ambulance and rescue service employees are regularly dispatched to fires, crime scenes, riots, natural disasters, and accidents.

[4] The Seventh Circuit, in Alex v. City of Chicago, 29 F.3d 1235, 1241 n.5 (7th Cir. 1994), addressed this conundrum and stated: "The plain language of § 553.215, or more precisely a negative inference drawn from the plain language- referring to employees of "other" agencies- does not resolve matters here...because the language of § 553.210, the appropriate starting point of our analysis, almost as plainly counters that interest." The court further explained the cross reference in § 553.210 to § 553.215 as follows:

> The Labor Department has confirmed what the cross reference 'See § 553.215 strongly implies: that the substantial relatedness of a fire department's ambulance personnel to the agency's fire protection activities, as explicated in § 553.215, tests such personnel's eligibility for the § 7(k) exemption just as it tests allpublicly employed ambulance personnel's eligibility for the exemption.

Various circuits have utilized different combinations of these regulations when deciding cases on this issue. The Fifth, Sixth, Seventh, and Eighth Circuits exempted emergency medical technicians from 29 U.S.C. § 207(a), and instead determined they were employed in "fire protection activities" under 29 U.S.C. § 207(k). The Fifth Circuit, in Bond v. City of Jackson, 939 F.2d 285 (5th Cir. 1991), reached its conclusion using 29 C.F.R. §§ 553.210, 553.215, and a Department of Labor Wage and Hour Division Administrative Letter Ruling dated October 9, 1987. The emergency medical services employees at issue received training for rescue for purposes of § 553.215 since they had knowledge of basic lifesaving procedures (CPR, administering oxygen, and extrication techniques). Pursuant to the DOL Letter Ruling, the court determined that it was not necessary that the employees routinely perform the lifesaving procedures. Additionally, the "regularly dispatched" requirement was met. The Fifth Circuit solved the inherent complexity between § 553.210 and § 553.215 by ignoring the first sentence of § 553.215.

The Sixth Circuit, by applying §553.210 in conjunction with the substantially related test set forth in § 553.215, held that rescue and ambulance service employees of a public

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§ 553.210 describes in general terms what § 553.215 expounds in more detail.

Alex, 29 F.3d at 1242.

agency's fire protection activities satisfied the "integral part" requirement. If the employees satisfied the substantially related test set forth in § 553.215, the 80/20 exemption requirement established in §553.212, and met the majority of work requirement, they were covered by 29 U.S.C. § 207(k). Justice v. Metropolitan Government of Nashville, Davidson County, 4 F.3d 1387 (6th Cir. 1993).*See also* Alex v. City of Chicago, 29 F.3d 1235 (7th Cir. 1994) (The court applied the § 553.215(a) substantially related test, but determined that paramedic employees of the city fire fighting department were not covered by the exemption since they did not receive training to perform rescue activities beyond those of a medical nature).

The Fourth Circuit's decision in West is directly at odds with the approach taken by the Eighth Circuit. The Eighth Circuit applied 29 C.F.R. § 553.212 in the recent case of Christian v. City of Gladstone, 108 F.3d 929 (8th Cir. 1997) after determining that paramedics who were also sworn firefighters were employees in fire protection activities under the four part test of §553.210. In considering the meaning of nonexempt work in § 553.212, the Eighth Circuit utilized the approach established by the Fourth Circuit in Schmidt v. County of Prince William, 929 F.2d 986 (4th Cir. 1991). The Fourth Circuit approach requires two factors. First, is the work in question distinct from and unrelated to fire protection activities, and second, whether the essential nature of the firefighter's job changes and he is required to perform tasks unrelated to his job. The Eighth Circuit held that time spent on paramedic activities

not stemming from a fire or car accidents is exempt, since responding to such calls does not alter the nature of the paramedics' duties or cause them to perform tasks unrelated to their job.

However, other courts, faced with similar situations, decided emergency medical technicians were not engaged in fire protection and were subject to 29 U.S.C. § 207 (a), not § 207(k). *See* Spires v. Ben Hill County 980 F.2d 683 (11th Cir. 1993) (emergency medical technicians did not satisfy the regularly dispatched requirement, the second element of the § 553.215 test); Nalley v. Mayor of Baltimore, 796 F.Supp. 194 (D.Md. 1992) (applied §553.210 four part test and determined employees were not an integral part of the fire protection activities; only 1% of their time was spent on fire related activities, so § 553.212 80/20 test not satisfied, and § 553.215 inapplicable by its terms.); Burgess v. Catawba, 805 F.Supp. 341 (W.D.N.C. 1992) (Although § 553.215 requirements met, more than 70% of calls were medical and not fire related, therefore § 553.212 80/20 test not met.); Horan v. King County Division of Emergency Medical Services, 740 F.Supp. 1471 (W.D.Wash. 1990) (not trained to rescue nor regularly dispatched within § 553.215 meaning).

It is uncontroverted among the circuits which considered the issue that ambulance and rescue service personnel can be included within the term "employee in fire protection activities." However, due to the various readings of the Department of Labor Regulations, the circuits are deeply misguided over what

test or tests are to be used and when they should be used. The Court should grant certiorari to clarify the misconceptions and provide a uniform interpretation.

II.

CONGRESS INTENDED THE § 7(k) EXEMPTION TO PERTAIN TO LOCAL GOVERNMENT EMPLOYEES ENGAGED IN AMBULANCE AND RESCUE SERVICES.

Investigation into the legislative history surrounding the FLSA and the 1974 Amendments reveals the Congressional intent to exclude public ambulance and rescue employees from the general forty hour overtime standard. Congress intended to include public ambulance and rescue employees within the § 207(k) exemption.

Recognizing the special needs of governments in adequately providing for the public safety, Congress established a limited overtime provision for "police officers, firefighters, and *related employees*." (Emphasis added). 52 Fed.Reg. 2012, 2015.[5] Due to the unusually long hours public safety employees are required to spend on duty, ready and available to respond to calls to protect the public safety, Congress appreciated the fiscal hardship State and local governments would suffer if required

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[5]The applicable overtime provision provides that firefighters are to be compensated for overtime after working 212 hours in 28 consecutive days.

to compensate public safety employees on the same basis as other governmental employees. Therefore, the 1974 Amendments, while extending the minimum wage and overtime coverage of the FLSA to all government employees, maintained the overtime exemption for policemen and firemen. The rationale behind exempting policemen and firemen pertains equally to ambulance and rescue service employees. EMTs are subject to the same unusually long hours to protect the public safety. Therefore, it is nonsensical to apply the § 207(k) exemption to policemen and firemen but not to ambulance and rescue service personnel subject to the same unusually long hours for identical reasons.

Representative Quie, the ranking member of the General Labor Subcommittee during passage of the 1974 Amendments, when queried about Congress' intent to cover employees engaged in rescue-ambulance services by the phrase "public agency employees who are engaged in fire protection... 'activities'", replied:

> ...that provision...is intended to cover those employees directly employed by a public agency who are engaged in rescue or ambulance activities which are substantially related to fire protection or law enforcement activities...

120 Cong.Rec. 8598 (1974). The legislative history referring to Congress' intent with respect to ambulance and rescue service personnel is scarce. However, the above colloquy clearly

indicates § 207 (k) was designed to include emergency medical technicians.

III.

THE PLAIN STATEMENT RULE EMPLOYED IN GREGORY APPLIES TO TRADITIONAL AND ESSENTIAL STATE FUNCTIONS, INCLUDING THE OPERATION OF LOCAL FIRE DEPARTMENTS.

Finally, the ambiguity of the exemption at issue raises questions of statutory construction. The application of the "plain statement" rule presented in Gregory v. Ashcroft, 501 U.S. 452 (1991) requires the Court to include emergency medical technicians within the §207 (k) overtime exemption. Faced with the applicability of the ADEA to state judges, the dispute revolved around whether state judges were encompassed by the exemption referring to "policymaking level appointees." Due to the ambiguity of the phrasing, the court applied the plain statement rule. Since the ADEA did not *plainly cover* appointed state judges, this Court held state judges were not covered by the ADEA.[6]

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[6]The Court stated: " Nonetheless, 'appointee at the policymaking level', particularly in the context of the other exemptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not 'employees' would seem the most efficient phrasing...We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included." 111 S.Ct at 2404.

Recognition of the delicate balance between permissible federal power under the Commerce Clause and impermissible intrusions on State sovereignty compels use of the plain statement rule in the instant case. When a federal law imposes a major intrusion on state authority, the Court must be absolutely certain such an outcome was intended for the law to be upheld as applied to the States. Protection of the important constitutional concept of federalism, on which our government is predicated, requires the federal government to explicitly state its intent to overturn local autonomy. The plain statement approach is an important tool for protecting state authority. Congress must address federalism concerns explicitly.

Analogous to the application of the ADEA to state judges, the FLSA does not *plainly cover* ambulance and rescue service personnel. Therefore, since Congress did not plainly state that ambulance and rescue service personnel were to be covered by the forty hour overtime provisions of the FLSA, the logical conclusion applying the Gregory plain statement rule is that they are not covered by the FLSA.

IV.

THE FLSA, AS APPLIED TO THE STATES PURSUANT TO GARCIA, IS VIOLATIVE OF THE TENTH AMENDMENT.

In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), this Court held that the overtime and

minimum wage provisions of the Fair Labor Standards Act, as applied to a public mass transit authority, are not violative of any constitutional provision or destructive of state sovereignty. The Court overruled its decision in National League of Cities v. Usery, 426 U.S. 833 (1976), which held that the Commerce Clause does not empower Congress to enforce the FLSA against the States in areas of traditional governmental functions. The dissenting Justices in Garcia believed the majority misconstrued the concept of federalism, resulting in continued uncertainty as to the correct approach in determining whether Congressional action under the Commerce Clause impermissibly infringes on fundamental aspects of state sovereignty. However, the dissenting Justices believed "that this Court will in time again assume its constitutional responsibility." Garcia, 469 U.S. at 589. This case grants the Court an opportunity to clarify the boundaries of Congressional power under the auspices of the Commerce Clause.

Since the 1985 decision, this Court has issued several opinions conflicting with the principles enunciated in Garcia, yet never explicitly overruled the decision. Most recently, in Printz v. United States, 117 S.Ct. 2365 (1997), the court concluded that the Federal government may not compel the States to enact or administer a federal regulatory program. Id., at 2383. *See also* New York v. United States, 505 U.S.144, 188 (1992). The 1974 Amendments to the FLSA compel the States to administer the federal regulatory program regarding minimum wage and overtime requirements to State and local employees, and in

accordance with the holdings of Printz and New York, are unconstitutional.

A second dilemma exists in determining whether the FLSA is a federal law of general applicability, an issue important to ascertaining whether a balancing analysis is appropriate.

The 1974 Amendments to the FLSA applied specific provisions to state and local governments only, therefore, while the FLSA may be a law of general applicability, § 207(k), which is directed solely to state and local governments, is not. The whole object of the 1974 Amendments was to direct the functioning of the state executive, compromising the structural framework of dual sovereignty. Printz at 2383. In such a case, the law violates the basic principle of state sovereignty, which is a fundamental defect which cannot be overcome, and a balancing analysis is improper. Id. As such, the law must be declared unconstitutional as violative of state sovereignty.

Alternatively, even if the 1974 Amendments to the FLSA are recognized as laws of general applicability, Justice Powell, in his dissent in Garcia, establishes the proper analysis. Returning to the National League of Cities balancing test, Justice Powell weighs the federal interest in remedying substandard working conditions against the state interest in maintaining state sovereignty, and finds the state interest compelling.

> The financial impact on states and localities of displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as

> well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes.

469 U.S. 578 (Powell, J., dissenting).

The 1974 Amendments, as applied to state and local governments, excessively interfere with the organization of governmental fire departments and hence affects how a government performs critical public safety functions. The local government is best suited to control public safety operations, firefighting, police forces, and emergency medical services. The question of the application of the FLSA to ambulance and rescue service personnel raises issues of federalism, and again broaches the propriety of the Garcia decision. "While the language of Garcia seemed definitive, the closeness of the vote, and the strength of the views expressed in the dissents suggested that the majority's judicial withdrawal from the field of Tenth Amendment federalism would not be the last word". James F. Blumstein, *Federalism & Civil Rights: Complementary and Competing Paradigms,* 47 Vand.L.Rev. 1251, 1287 (1994). This case presents an opportunity for the Court to readdress Tenth Amendment federalism in this context.

CONCLUSION

For the foregoing reasons, along with those set forth in the Petition filed by Anne Arundel County, Baltimore County requests that this court issue a writ of certiorari to consider this case.

Respectfully submitted,

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